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No. 90-1488

In The

Supreme Court of the United States

October Term, 1990

SUE SUTER, et al.,

Petitioners,

v.

ARTIST M., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF LOUISIANA, ALABAMA, ARIZONA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER STATE OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether Section 671(a)(15) of Title IV-E of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. Sec. 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," is too vague and amorphous to create an individually enforceable right in the complex area of child welfare.

2. Whether children living at home, who are not in foster care, have enforceable rights under Title IV-E of the AAA, which provides reimbursement for "foster care maintenance payments," when the states receive no federal Title IV-E funds to provide services to those children.

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INTEREST OF AMICI CURIAE

Amici are states that, like Illinois, accept federal reimbursement for "foster care maintenance payments"

under Title IV-E of the Adoption Assistance and Child Welfare Act of 1980, a federal-state cooperative funding statute.[1] Amici also accept federal funds under numerous other spending-clause statutes.

The Seventh Circuit's decision in *Artist M. v. Johnson*, 917 F.2d 980 (7th Cir. 1990), holds that the AAA's vague "reasonable efforts" clause, 42 U.S.C. Sec. 671(a)(15),[2] creates enforceable rights under 42 U.S.C. § 1983 ("Section 1983") and through an implied private right of action. That holding adversely affects all states that accept Title IV-E reimbursement for foster care costs. The court's novel finding that children both in and out of foster care have an enforceable right to "reasonable efforts" exposes the states to the potential of costly litigation challenging decisions in every child welfare case, whether or not Congress provided Title IV-E funding for that case. Moreover, applied to other imprecise spending clause statutes, the *Artist M.* precedent will lead to a host

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[1] Because this brief is filed on behalf of states by their respective attorneys general, and the District of Columbia by its authorized law officer, its filing does not require consent of respondent or the Court. See Sup. Ct. R. 37.5.

[2] Section 671(a)(15) provides, in pertinent part:

> In order for a State to be eligible for [foster care maintenance] payments under this part, it shall have a plan approved by the Secretary which –
>
> . . .
>
> (15) . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

of other new federally-imposed obligations to persons for whom the states receive little or no federal funds. Many of these statutes, like the one at issue here, are so vague that states could not possibly have known the extent of their specific obligations when they accepted federal funds.

SUMMARY OF ARGUMENT

For more than a decade, the states have been developing and expanding foster care services funded in part through federal reimbursement under Title IV-E of the Adoption Assistance Act. In 1980, Congress enacted the AAA as an amendment to the Social Security Act. The cooperative funding statute was designed to create "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Social & Rehabilitation Servs. v. United States Dep't of Health & Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987); *see also Spielman v. Hildebrand*, 873 F.2d 1377, 1386 (10th Cir. 1989); *Scrivner v. Andrews*, 816 F.2d 261, 263 (6th Cir. 1987). To create those "incentives," Title IV-E provides reimbursement for foster care costs in exchange for adoption of a state plan meeting certain requirements, including establishment of a case planning process and case review system, both defined in the statute. *See* 42 U.S.C. §§ 671(a)(16), 675(1), (5), (6).

Using the analogy used by this Court in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), those terms set out the "contract" to which a state is

bound when it accepts federal funds. To those *procedural* mandates defined in the AAA, Congress added the "reasonable efforts" requirement of Section 671(a)(15). Nowhere does the statute define "reasonable efforts," however, recognizing instead that what is "reasonable" depends on the unique circumstances of each individual case and, hence, that such determinations should be left to the states. Thus, Title IV-E carefully balances certain specific procedural requirements with a recognition that child welfare decision making is a difficult process, best committed to specialists at the state level with both expertise and knowledge of the unique circumstances of individual cases.

The Seventh Circuit's opinion in this case upsets the careful balance of federal and state interests enacted by Congress in Title IV-E. Because Congress did not define "reasonable efforts," and because the term is too vague and amorphous to be defined except by state courts with juvenile jurisdiction on a case by case basis, the Seventh Circuit looked to the practices that Illinois had voluntarily implemented to provide reasonable efforts to determine the services to which children in that state were entitled. This approach, if applied in other states, would lead to the incongruous result that children in different states would have different federal rights under the AAA. Such an outcome inevitably subjects states with more extensive welfare programs to more extensive obligations under federal law. By discouraging expansion of state child welfare services, such a result flatly contradicts congressional intent to "encourage" improvements in those systems.

In addition, by allowing each child served by state and local child welfare agencies to sue state officials in federal court every time the child, or some advocate for the child, feels the state's efforts have not been "reasonable," the opinion below will unleash a torrent of litigation challenging the best efforts of state and local child welfare officials and juvenile courts in individual cases. Such litigation will divert states' limited resources to federal litigation instead of services to children. That outcome is directly contrary to the federalism inherent in the AAA, and will deter aggressive and innovative approaches to child abuse and neglect cases.

Under the opinion below, states can no longer ascertain the parameters of their potential liability when they agree to participate in a federal-state cooperative funding program. Indeed, the court below holds that, by accepting federal reimbursement for certain foster care costs, the states also unwittingly accept liability under Section 1983 to children not in foster care, for whom the states receive no Title IV-E reimbursement for direct social services. That holding has implications far beyond the circumstances of *Artist M.* and the AAA. *Artist M.* potentially expands states' obligations under all federal-state funding statutes and creates an unacceptable level of uncertainty surrounding the commitment states make when accepting federal funds. Amici therefore urge this Court to reverse the Seventh Circuit's decision.

ARGUMENT

I.

BECAUSE THE "REASONABLE EFFORTS" CLAUSE IS VAGUE AND UNDEFINED, THE OPINION BELOW CREATES DIFFERENT FEDERAL RIGHTS IN DIFFERENT STATES, DISTORTING STATE CHILD WELFARE DECISIONS AND CREATING A RISK OF INCONSISTENT "RIGHTS"

The opinion below holds that the AAA's vague and amorphous "reasonable efforts" clause creates individually enforceable federal rights directly and through Section 1983. By looking to Illinois' own actions in determining the contours of those rights, the Seventh Circuit's analysis leads to the result that a vague statute may create different federal rights in different states. Because the statutory language is imprecise and undefined, a finding of enforceability exposes state officials to countless lawsuits, both individual and class actions, asserting rights to individual substantive services. Those claims, based on each plaintiff's notion of "reasonableness," will lead to inconsistent judgments and expanded federal intervention into individual state child welfare and adoption decisions, an area of primary state concern.

Nor are these consequences limited to the AAA or the child welfare area. The Seventh Circuit's analysis serves as a precedent for interpretation of other statutes enacted pursuant to the spending power, which will lead to the creation of a host of novel rights without any showing of congressional intent to do so. The Seventh Circuit's opinion is nothing less than abandonment of the "contract" theory of federal funding statutes set out in *Pennhurst* and its progeny. The *Artist M.* court's failure to

replace that theory with any similar framework results in the transformation of federal-state cooperative funding statutes into empty vessels, to be filled after enactment by creating "rights" based on the facts of individual cases.

A. The Opinion Below Conflicts With *Pennhurst* By Holding That Federal Law Creates Different Federally Enforceable Rights In Different States

In *Pennhurst*, 451 U.S. 1, this Court held that cooperative federal-state funding statutes like the AAA are akin to contracts: in return for federal funds, the states agree to comply with specific conditions set forth in the statute. *Id.* at 17, 24-25. Congress must speak *clearly* "so that we can fairly say that the State could make an informed choice." *Id.* at 24-25. *See also Gregory v. Ashcroft*, 59 U.S.L.W. 4714 (U.S. June 20, 1991) (*Pennhurst* applies a "plain statement" rule). An unclear statutory provision, which does not allow the states to determine the precise nature of their obligations, creates no enforceable rights. *Id.*[3]

The opinion below turns *Pennhurst* on its head. Rather than acknowledging that under *Pennhurst* the "reasonable efforts" clause is too unclear and amorphous to create an enforceable right, the Seventh Circuit fails to even mention the *Pennhurst* requirement. Instead, the majority reasons that because Congress left it to the states to devise and implement a plan to provide reasonable

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[3] Like this case, *Pennhurst* involved claims to a wide array of social services, based on a vague statutory provision. *See* 451 U.S. at 24-25 (rejecting claim to "appropriate treatment" in the "least restrictive" setting).

efforts, each state's actions in that regard are determinative of that state's liability under the "reasonable efforts" clause. Following this analysis, the court holds that Illinois' decision "to use caseworkers as the means through which these services are provided" creates an enforceable right to have a caseworker assigned within three days. (App. 11a).[4]

Under the Seventh Circuit's reasoning, because each state uses different means to make reasonable efforts to prevent foster care placement and reunify families, each state is subject to varying federally enforceable rights under the AAA. That outcome is contrary to *Pennhurst*'s holding that a federal funding statute creates enforceable rights only if the states know, *ex ante*, what responsibilities they are assuming. *Pennhurst*, 451 U.S. at 24-25. The notion of rights based on a state's actions after it has accepted federal funds is flatly inconsistent with the requirement that states be able to ascertain their obligations before accepting the "contract."[5]

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[4] "App." citations are to the Appendix to the Petition for a Writ of Certiorari.

[5] This Court's other spending-power decisions are fully consistent with the "contract" theory of *Pennhurst*. Most cases in this area concern monetary entitlements and specifically determinable levels of grant money. States' obligations to provide such easily calculated benefits are clear at the time the states accept federal funds.

Rosado v. Wyman, 397 U.S. 1207 (1970), *Maine v. Thiboutot*, 448 U.S. 1 (1980), and *Miller v. Youakim*, 440 U.S. 125 (1979), all involved benefits payable under the Aid to Families with Dependent Children program. Similarly, *Wilder v. Virginia Hospital Association*, 110 S.Ct. 2510 (1990), addressed methods of

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By ignoring Congress' explicit statement that "reasonable efforts" would vary "in each case," the Seventh Circuit has set a precedent which could never be uniformly applied to other states.[6] Child welfare is not and cannot be based on a single practice model in every state. What one state may consider "reasonable efforts" may be unreasonable in another state due to differences in client population and available resources. Even within a single state, there are distinct variances from region to region depending on such factors as whether the region encompasses an urban area or rural communities. In recognition of that fact, many state child welfare systems are administered by a separate agency in each county.

Further, philosophical and practice variations among social workers, social work supervisors, judges, lawyers and other professionals underscore the complexity of child welfare decision making in individual cases. Experts often disagree as to the timing and means for

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determining reasonable Medicaid reimbursement rates paid to health care providers. This Court found an enforceable right to "reasonable and adequate" reimbursement rates only because those rates were tied to an "objective benchmark" in the statute. *Id.* at 2522. The "reasonable efforts" clause contains no such benchmark; instead, Congress acknowledged in the statute that "reasonable efforts" determinations must be made by state officials and juvenile courts "in each case." 42 U.S.C. § 671(a)(15).

[6] Likewise, the Secretary of Health and Human Services has deferred to state determinations of which services are needed in individual cases. *See* 45 C.F.R. § 1357.15(e)(2) (listing a plethora of services the states "*may*" provide).

reunifying a child with a parent who abused or neglected that child. Even at a systemic level, there is no consensus regarding the relative allocation of limited resources to long-term placement and adoption as opposed to preventive and reunification services.[7]

More important, the Seventh Circuit's analysis discourages change and improvement in state child welfare programs. Under the holding below, a state adopting new child welfare programs will face increased obligations under the AAA, since the state presumably will have determined that the more extensive services are "reasonable." Moreover, much progress in this area is accomplished through pilot programs testing new approaches, such as intensive family intervention, with limited populations. If every child in the system may claim a "right" to all such resources, many programs will never see the light of day.

Congress certainly never intended that the very statute it established to encourage improvements in child welfare would serve as a disincentive to states to design and implement new programs. Rather the AAA was intended to create incentives for new programs and approaches to child welfare. A holding that the "reasonable efforts" clause creates enforceable rights undermines that goal and may cause incalculable harm to abused and neglected children and families served by child welfare agencies throughout the country.

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[7] Congress acknowledged that, in some cases, *no* reunification services are appropriate. H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979).

B. By Creating a Federally Enforceable Right Where Congress Intended None, The Opinion Below Greatly Expands Federal Court Intervention Into Individual State Child Welfare Decisions, Creating Unsound Child Welfare Policies

In enacting the AAA, Congress recognized the difficulty of individualized decisions in abuse and neglect cases, and recognized that such decisions are best left to the states. *See, e.g.*, H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) ("The decision as to the appropriateness of specific situations will have to be made by the administering agency having immediate responsibility for the care of the child."); S. Rep. No. 336, 96th Cong., 2d Sess. 1, 16, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1466 (recognizing that states have "primary responsibility" for child welfare); 125 Cong. Rec. 22685 (Aug. 3, 1979) (remarks of Sen. Cranston, the AAA's sponsor) (Congress intended to "leav[e] to the discretion of the States the precise mechanisms for protecting the rights of persons in the foster care system").

The very structure of the statute reflects Congress' intent to defer decision making to the states. In Title IV-E itself, Congress established *state* juvenile courts as the primary check on states' compliance with the "reasonable efforts" requirement. Under Section 672(a)(1) of the AAA, prior to removing a child from the home, the state must obtain a "judicial determination to the effect that continuation therein would be contrary to the welfare of such child *and . . . that reasonable efforts . . . have been made.*" 42 U.S.C. Sec. 672(a)(1) (emphasis added).[8] Section 675(5)(B)

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[8] Section 672(a)(1) makes clear that any right to "reasonable efforts," if it existed at all, would be limited to the

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requires that each case be reviewed in a judicial or administrative proceeding every six months. A state juvenile or family court must hold a dispositional hearing for each child in foster care within 18 months of state custody. *See* 42 U.S.C. § 675(5)(c) (court "shall determine the future status of the child" including return home, adoption, or short-term or long-term foster care). Thus, Congress clearly intended that "reasonable efforts" determinations be made by state juvenile courts, which have extensive experience in the area, a knowledge of available state, local and community resources, and a detailed grasp of individual cases.[9]

The opinion below holds that every child served by a state child welfare agency may sue state officials in federal court when that child, or the child's advocate,

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procedural right to a state juvenile court determination. *Cf.* 45 C.F.R. §§ 1356.21(b), 1357.15(e) (leaving determination of which efforts to provide in each case to the states).

[9] The AAA's unique mechanism to ensure regular judicial review by specialized state courts, in conjunction with the statute's mechanism for federal oversight, evinces a congressional intent to foreclose Section 1983 as a separate remedy. *See Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 20 (1981). In many instances, enforcement through Section 1983 furthers congressional goals in enacting a statute. Here, by contrast, Congress intended to leave complex "reasonable efforts" decisions to state juvenile courts, which have a detailed knowledge of individual cases and specialized knowledge from handling such cases regularly. Therefore, this Court should find that Congress intended to bar a federal Section 1983 remedy. *Cf. Smith v. Robinson*, 468 U.S. 992, 1003 (1984); *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991).

believes that the state's efforts have not been "reasonable." See App. 29a (Manion, J., dissenting). By creating enforceable rights from an undefined and vague statutory term, the Seventh Circuit has held that federal judges may give definition to that language, based on the pleas of individual plaintiffs in isolated cases, thereby creating a powerful and unintended vehicle for expansion of federal rights. In the words of the dissent below, the panel opinion opens the door to an "avalanche" of litigation and turns the federal courts into "crisis administrator[s] of child welfare." (App. 29a-30a (Manion, J., dissenting)).

Nor is that "avalanche" merely a wild-eyed prediction: it has already begun. Many states presently face actions raising "reasonable efforts" claims. *See, e.g., Children ABCDEF v. Martinez*, No. 90-2416 (S.D. Fla. filed Oct. 1990); *M.E. v. Martinez*, No. 90-1008 (S.D. Fla. filed May 1990); *Baby Neil v. Casey*, No. 90-2343 (E.D. Pa. filed April 4, 1990); *LaShawn v. Dixon*, No. 89-1754 (D.D.C. filed June 20, 1989); *R.C. v. Hornsby*, No. 88-D-1170-N (M.D. Ala. filed Nov. 1988); *Del. A. v. Edwards*, No. 86-801 (E.D. La. filed Jan. 1986). Many more cases recently have been filed in other states.

In one such action, *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), the district court, following the district court opinion in *Artist M.*, held that Illinois' efforts to reunite two individual families were not "reasonable," and entered individualized injunctions. In the case of a third plaintiff, the court found the state's efforts "reasonable," but stated that the court might reconsider that ruling if the state did not provide the plaintiff with sufficient beds. *Id.* at 1208 & n.8 (Report and Recommendation of Magistrate adopted by district court). Nothing

in the AAA evidences Congress' intent to invite such federal judicial micro-management of individual foster-care cases.

Indeed, such federalization of daily child welfare decisions reflects a lack of understanding of the delicate balancing of interests that state officials and juvenile courts must accomplish in each case.[10] The children who come into foster care have been severely abused or neglected, most often by the very parent who seeks the child's return. In making "reasonable efforts" to keep the child at home or to reunify the family, state child welfare specialists, and the juvenile courts that closely supervise their actions, must balance the parental interest in prompt reunification against the safety and welfare of the child. If the state officials err in that calculus, a child may suffer permanent injury. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (child returned home by state juvenile court was beaten so severely by his father that he must spend the remainder of his life in an institution for the profoundly mentally retarded).

There are no pat solutions to the problems that cause child abuse and neglect. "Reasonable" minds may differ as to the timing and means for reunification, and in

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[10] Concerns of federalism and comity underlie many federal decisions construing the AAA. *See, e.g., Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) (no substantive enforceable right conferred by the AAA to a hearing before a state agency); *Winston v. Children and Youth Servs.*, 748 F. Supp. 1128 (E.D. Pa. 1990) (no enforceable right conferred by the AAA to "meaningful visitation"); *Lesher v. Lavrich*, 784 F.2d 193 (6th Cir. 1986) (no private cause of action for damages or for nullification of a state court judgment under the AAA).

judicial hindsight it is all too easy to equate "reasonable efforts" with "successful efforts." This Court acknowledged as much in *DeShaney*, pointing out that, had the state moved more quickly to protect Joshua DeShaney, it "would likely have been met with charges of improperly intruding into the parent-child relationship. . . . " *Id.* at 203.

This case presents the reverse side of the *DeShaney* coin. In *DeShaney*, this Court was concerned that state officials have the freedom to exercise their best judgment on delicate matters of child welfare, without facing federal constitutional claims every time they fail to act quickly in taking custody of a child. Here, plaintiffs ask the Court to create a novel right of action on behalf of those who feel the state has acted *too quickly* in protecting a child. As the dissent below recognized, that result would lead to the same "paralysis" of child welfare agencies that concerned this Court in *DeShaney*. (App. 30a).

Instead of recognizing Congress' intent under the AAA to defer to state courts and state child welfare specialists in individual cases, the opinion below thrusts these complex issues before federal judges, setting them up as "super-juvenile courts." As the dissent predicts:

> Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits. Delay and denial will result because standing for injunctive and declaratory relief has now been extended to every plaintiff with a notion of "reasonable efforts" that conflicts with that of the DCFS. The DCFS will most likely experience considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs

> and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done.

(App. 30a (Manion, J., dissenting)).

Children would be better served by strengthening the existing system of state courts and state administrative reviews than by creating a new layer of federal judicial oversight, which would function in tandem (and often in conflict) with the state court and administrative systems.[11] Rather than allowing a state to determine the appropriate balance of resources, so that it may serve the most children in the most effective and efficient manner possible, federal judges will be forced to decide what allocation of resources is "reasonable" based on the facts of one individual's case. Multiplied by dozens of decisions, each based on a limited view of the landscape, the opinion below will result in a distortion of priorities across the child welfare system.

At present, the states are striving to deal effectively with the growing problem of abused and neglected children. Everyone involved in the child welfare system — including families, state officials, judges, and advocates — agrees on the ultimate goal of protecting children while at the same time reducing unnecessary placements and reunifying families as promptly as is prudent under the

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[11] The state courts are of course subject to review by the Supreme Court to ensure that the state processes comport with the Constitution and federal law. *See, e.g., In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (construing Indian Child Welfare Act).

circumstances of each individual case. By making every difficult decision in every child's case a potential subject of federal litigation, and by inhibiting progressive child welfare policy, the Seventh Circuit's decision in this case sets that struggle back immeasurably. Because of the court's error in this case, and because that error may soon be compounded in other spending-clause cases, amici urge this Court to reverse the decision below.[12]

II.

THE EXTENSION OF ENFORCEABLE RIGHTS TO CHILDREN FOR WHOM THE STATES RECEIVE NO FEDERAL TITLE IV-E FUNDS FOR PROVISION OF SUBSTANTIVE SERVICES REMOVES A CRUCIAL LIMITATION ON FEDERAL COURT POWER TO CREATE ENFORCEABLE RIGHTS

The breadth of the court of appeals' ruling is perhaps best evidenced by the fact that the court found, in a single conclusory paragraph, that children residing in their own homes may sue state officials for preventive services. (App. 18a). In enacting Title IV-E of the AAA, Congress drew a clear line between children in foster care, for

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[12] The court of appeals also found that Section 671(a)(15) authorizes an implied private right of action under *Cort v. Ash*, 422 U.S. 66, 78 (1975). As discussed above, plaintiffs have not met their heavy burden of showing that Congress *intended* to create those rights. In addition, inference of a federal right to "reasonable efforts" is fundamentally inconsistent with the statute's deference to state courts and state agencies and runs contrary to this Court's longstanding recognition that child welfare is primarily an issue of state concern. *See, e.g., Moore v. Sims*, 442 U.S. 415, 435 (1979).

whom the states receive federal reimbursement, and children living at home, for whom the states receive no Title IV-E funds for substantive services. *See* 42 U.S.C. § 672(a) (states receive *"foster care maintenance payments"* in return for complying with conditions in Section 671); 42 U.S.C. § 672(b) ("foster care maintenance payments" made only for children residing in a "foster family home" or "child care institution"); 45 C.F.R. § 1355.20 (foster family home "provides *out-of-home* care for children").[13]

The court below disregarded that powerful evidence in the AAA's structure and extended the novel "reasonable efforts" right to children who reside in their own homes. (App. 18a). Thus, the states now face the possibility of "reasonable efforts" litigation brought by *any* child served by a state child welfare agency. Congress never envisioned that expansion of federal judicial intervention into state child welfare systems.

Moreover, the court of appeals' ruling runs flatly contrary to *Pennhurst*. In *Pennhurst*, this Court refused to find enforceable rights under a statute where Congress provided only a small amount of federal funds: "When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs." *Pennhurst*, 451 U.S. at 24. Title IV-E of the AAA provides *no* "substantial contribution" to

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[13] Some states obtain Title IV-E reimbursement for a small percentage of "administrative costs" associated with candidates for foster care who have not yet been determined eligible for foster care maintenance payments. *See* 42 U.S.C. § 674(a). Section 674(a) does not provide reimbursement for direct services to families. 45 C.F.R. § 1365.60(c)(3).

serve children in their own homes. Thus, under *Pennhurst*, this Court should find that Congress intended not to create enforceable rights on behalf of those children.

The impact on the states of the Seventh Circuit's holding extends far beyond the sphere of child welfare and the AAA. The AAA is one of many of cooperative federal-state funding statutes. Under the court of appeals' decision, plaintiffs may sue to enforce "rights" under those statutes whether or not Congress intended to create those rights or provided any federal funds to offset a portion of the cost. That result contravenes principles of federalism and fairness, and should be reversed by this Court.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioners, *amici* respectfully urge this Court to reverse the judgment of the Court of Appeals for the Seventh Circuit.

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